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No. 75-593

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

POLISH AMERICAN CONGRESS and
THADDEUS L. KOWALSKI,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION,
UNITED STATES OF AMERICA

and

AMERICAN BROADCASTING COMPANIES, INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR AMERICAN BROADCASTING COMPANIES, INC. IN OPPOSITION

JAMES A. McKENNA, JR.
CARL R. RAMEY
1150 Seventeenth Street, N.W.
Washington, D. C. 20036

Attorneys for American Broadcasting Companies, Inc.

Of Counsel:

McKENNA, WILKINSON & KITTNER
1150 Seventeenth Street, N.W.
Washington, D. C. 20036

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OPINIONS BELOW

The opinion of the court of appeals affirming the decisions of the Federal Communications Commission (hereinafter "Commission") is reported at 520 F.2d 1248 (1975) and is reprinted in the Appendix to the Petition

herein at pages A1-A14. The letter ruling of the Commission's Broadcast Bureau is reported at 42 FCC 2d 1110 (1973) and reproduced in the Appendix at pages A15-A18; and the *Memorandum Opinion and Order* of the Commission upholding the Broadcast Bureau's ruling is reported at 46 FCC 2d 124 (1974) and reproduced in the Appendix at pages A19-A21.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 1975. The petition for certiorari was filed within ninety days thereafter. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED FOR REVIEW

Whether the court of appeals committed error in affirming the decisions of the Federal Communications Commission which found that American Broadcasting Companies, Inc. (hereinafter "ABC") made a reasonable determination that the specific program material in question did not constitute the discussion of a controversial issue of public importance and, as such, did not invoke either the Fairness Doctrine or the Commission's Personal Attack regulations.

STATEMENT OF THE CASE

ABC believes that the pertinent facts leading to the decision by the court of appeals are succinctly and adequately set forth in the introductory material to that ruling. Accordingly, we rely on that portion of the lower court's synopsis of the proceeding which is reproduced in Petitioner's Appendix at pages A1-A5.

With regard to the substantive holding of the lower court, it may simply be observed that the court of appeals unanimously held that both the Commission and

ABC were reasonable in their determination that the portrayal of Polish joke material during a segment of the "Dick Cavett Show" guest-hosted by Steve Allen did not constitute the discussion of a controversial issue of public importance. This being the case, the court of appeals further found that neither the Fairness Doctrine nor the Personal Attack regulations were brought into play, since an essential prerequisite to application of both the Fairness Doctrine and the Personal Attack regulations is the discussion of a controversial issue of public importance.

ARGUMENT

1. This case presents no issue warranting review by this Court. Review on writ of certiorari is not a matter of right, but is discretionary and granted only where there are special and compelling reasons. See *Fay* v. *Noia*, 372 U.S. 391, 436 (1963). None of the traditional criteria for granting such review is present in this case. The decision below is in no way inconsistent with previous decisions of this Court. It is not in conflict with any other court of appeals decisions. It is not in any other way unusual or novel. On the contrary, it represents a standard application of long-held principles of communications law. Indeed, rather than demonstrating special and important reasons for review by this Court, Petitioners merely repeat arguments advanced first before the Commission and subsequently in the court of appeals, apparently under the mistaken assumption that this is merely another level of review to which they are entitled. See *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U.S. 175, 178 (1938). All of the arguments presented here were carefully considered and correctly resolved by the court below, and since there is no issue which warrants the attention of this Court, certiorari should be denied.

2. This case is also singularly inappropriate for review by this Court because the court below explicitly limited its holding to the unique facts presented. It accepted the Fairness Doctrine and the Personal Attack corollary as it found them. It also accepted and followed guidelines upheld by this Court in previous rulings involving the Fairness Doctrine and the Personal Attack rules, applying them to a new set of facts in a manner that is entirely consistent with all known precedent in this area. See, *e.g.*, *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367 (1969); *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94 (1973). Moreover, the decision below did not even preclude Petitioners from raising the matter anew in future litigation should the circumstances they are concerned about develop anew. Thus, while the court below could not find that there had been a discussion of a controversial issue of public importance in this case, it did note that ". . . it is conceivable that an important public controversy could arise over the desirability of broadcasting Polish jokes at some time after the telecast relevant to this suit." (App. 13)

3. While there has been some vacillation by Petitioners as to the specific issue in question, it is beyond dispute that throughout this litigation Petitioners have argued that the mere presentation of a Polish joke on a broadcast station, *per se*, represents a *discussion* of a controversial issue of public importance, thereby potentially bringing into play both the Fairness Doctrine and the Personal Attack regulations. ABC, the broadcast licensee in this case, made the judgment that the presentation of the Polish joke material in question did not involve the discussion of a controversial issue of public importance. The two Commission decisions upheld this determination and the court of appeals decision upheld the Commission decision. The Petition merely seeks the Supreme Court's

final decision on this judgment. The six "questions" that are identified by the Petitioners (Petition, pages 2-3) as being involved not only highlight the general overall insubstantial nature of the Petition, but reflect the specific absence of any showing of valid reasons for review by this Court.

4. Petitioners argue that the court of appeals decision unreasonably "contracted" the meaning of the Personal Attack rule and ignored the "public interest" mandate of the Communications Act of 1934, as amended—presumably referring to the codification of the Fairness Doctrine in Section 315(a) of that statute. Petitioners then seem to suggest that there is something particularly unusual or unfair in the position of the court of appeals that they are not entitled to an opportunity to respond "unless such an attack is made during a discussion of a controversial issue . . ." (App. 5). To hold that a discussion of a controversial issue must take place before either the Fairness Doctrine or the Personal Attack regulations are involved is not a new addition to this basic area of the law. It neither "contracts" nor expands the law to abide by this requirement; rather it is a matter that is essential to both the Fairness Doctrine and the Personal Attack regulations and, in fact, is incorporated in the very rule and statement of policy which have been approved by this Court in *Red Lion*.

5. In essence, Petitioners continue to assert that the mere "recitation of . . . Polish jokes is the presentation of one view on a controversial subject which is of major importance" (Petition, page 6). To so hold, as the Commission and court below correctly concluded, would vastly extend the Fairness Doctrine and Personal Attack regulations. Petitioners want a special recognition for Polish jokes in the sense that, unlike other issues, the mere mention of the topic would constitute the presentation on one side of an issue. The word "discussion" would no longer

be relevant in these terms since isolated and fleeting references of a certain sort would stand alone as the "presentation" of an issue. It is in this context that the Petitioners assert that a Polish joke is an attack in and of itself and that this attack should be deemed controversial once it is "published" by a broadcaster. In their words, ". . . why cannot the mere recitation of this joke be deemed an issue of public importance since up to about 10 percent of the American population are characterized in the most unequivocal and demeaning terms?" (Petition, pp. 6-7). A sizable segment of the population may object to the characterization of many points, themes and references occurring in different forms of broadcast programming—but neither the mere portrayal or characterization itself, nor the adverse reaction or objection of a defined segment of the public, standing alone, can make a matter either controversial or of public importance.

6. Petitioners also argue that neither the Government nor ABC has ever attempted to argue that broadcasting of Polish jokes is only an incidental or rare occasion. Having said this, Petitioners then jump to the conclusory view that the broadcasting of such material involves what is characterized as "repeated activities" which Petitioners say can be acknowledged by this Court. First of all, this case involved only certain specific references on one telecast. Whether or not such activities are "repeated" on other networks and stations and to what extent, is simply a matter that heretofore has not even been an issue, much less demonstrated on the record. In fact, as noted by the court of appeals, even in this isolated and limited case, ABC apologized for the incident in question. While we do not contend that such material has not infrequently occurred on the broadcast medium in some context, it is a totally unwarranted and unfair position for Petitioners to now assert that this Court should take review because the alleged attacks are repeatedly and continuously broad-

cast. In short, there is no record evidence to support this allegation and it goes beyond the facts of the case.

7. Finally, the Petitioners suggest that there is nothing in the general field of humor nor of ethnic humor which is comparable to the Polish joke. While this point also seems to tr nscend the proscribed boundaries of this case, even as evaluated on its own terms the allegation is erroneous. Indeed, the contention that the Polish joke should be treated uniquely and covered by the Fairness Doctrine and the Personal Attack regulations underscores one of the greatest difficulties of this case. That difficulty involves the potential intrusion of First Amendment freedoms normally accompanying program decision-making in the broadcast field. In other words, to attach a Personal Attack or Fairness Doctrine significance to this kind of program material inhibits not only its use, but the use of similar material in a variety of circumstances. The inevitable consequence of so expanding the potential scope of the Fairness Doctrine and Personal Attack regulations would be to subject a much wider spectrum of entertainment programming to governmental intervention. If the Fairness Doctrine or Personal Attack regulations were to be applied in these circumstances we believe it would be very difficult to preclude their application to a whole host of general entertainment themes, satire, comedy sketches, and sterotype references. We believe that the court of appeals implicitly recognized these difficulties and, for that and other reasons, properly confined its ruling to the traditional application of Fairness Doctrine and Personal Attack principles.

CONCLUSION

The decision below, constituting an affirmance of the determination of a regulatory agency reasonably reached, is correct; there is no conflict of decisions; and no questions warranting further review are present. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted,

JAMES A. MCKENNA, JR.
CARL R. RAMEY
1150 Seventeenth Street, N.W.
Washington, D. C. 20036

Attorneys for American Broadcasting Companies, Inc.

Of Counsel:

MCKENNA, WILKINSON & KITTNER
1150 Seventeenth Street, N.W.
Washington, D. C. 20036

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